Appeal No. 2014AP1048 **Cir. Ct. No. 2012ME572**

WISCONSIN COURT OF APPEALS
DISTRICT II

IN THE MATTER OF THE MENTAL COMMITMENT OF CHRISTOPHER S.:

WINNEBAGO COUNTY,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER S.,

RESPONDENT-APPELLANT.

FILED

APR 01, 2015

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

This appeal raises an important issue of first impression regarding the constitutionality of a mental health treatment statute related to inmates within the Wisconsin state prison system. The question presented is whether WIS. STAT. § 51.20(1)(ar) (2013-14)[1] is facially unconstitutional on substantive due process grounds because it does not require that a court find an inmate dangerous prior to ordering the inmate civilly committed for treatment and authorizing the involuntary medication of the inmate. A definitive answer to this question from

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the Wisconsin Supreme Court, along with a clear statement as to the appropriate level of constitutional scrutiny to apply in such a case, would be of great value to the bench, the bar, the legislature, and the citizenry. Thus, we certify this appeal to the Wisconsin Supreme Court pursuant to WIS. STAT. RULE 809.61.

As a threshold matter, Christopher S. acknowledges he did not raise his facial challenge until the postjudgment stage of the proceedings, but asserts that review is nonetheless appropriate because "facial challenges to the constitutionality of a statute cannot be forfeited," citing ***State v. Bush***, 2005 WI 103, ¶¶14-19, 283 Wis. 2d 90, 699 N.W.2d 80. In its appellate brief, the County agrees the issue before us should be addressed and requests publication of any decision "because the case presents a question of first impression" which is of "substantial and continuing public interest." In its nonparty brief, the State does not challenge the appropriateness of appellate review.

A facial challenge to the constitutionality of a statute implicates subject matter jurisdiction, and such challenges may be raised for the first time on appeal. ***Id.***, ¶¶17, 19. Furthermore, because the statute is challenged on its face, we do not recite the particular facts of Christopher's commitment, but instead immediately proceed to describe the legal issue. *See*, *e.g.*, ***State v. Nelson***, No. 2005AP810, certification to the Wisconsin Supreme Court (WI App Mar. 2, 2006).

WISCONSIN STAT. § 51.20(1)(a) and (13)(a) empower a circuit court to order the involuntary civil commitment for treatment of an individual generally if the individual is found to be mentally ill, a "proper subject for treatment,"[2] and

[2] A "proper subject for treatment" is "defined to mean that 'rehabilitation' must be possible for the individual." ***Fond du Lac Cnty. v. Helen E.F.***, 2012 WI 50, ¶49, 340 Wis. 2d 500, 814 N.W.2d 179 (Abrahamson, C.J., concurring) (citing WIS. STAT. § 51.01(17)).

"dangerous" as defined in § 51.20(1)(a)2. Section 51.20(1)(ar) applies specifically to "inmate[s] of a state prison." Together with § 51.20(13)(a)4., § 51.20(1)(ar) empowers a court to order the involuntary civil commitment for treatment of an inmate based upon a petition that may allege the inmate is mentally ill and a "proper subject for" and "in need of" treatment and must allege "appropriate less restrictive forms of treatment have been attempted" but unsuccessful, the inmate "has been fully informed about his or her treatment needs, the mental health services available to him or her and his or her rights" under WIS. STAT. ch. 51, and the inmate "has had an opportunity to discuss his or her needs, the services available to him or her and his or her rights with a licensed physician or a licensed psychologist." Once a court orders an inmate civilly committed, § 51.20(13)(a)4. "authorize[s] the transfer of the inmate to a state treatment facility or if inpatient care is not needed authorize[s] treatment on an outpatient basis in the prison."

Under these provisions then, an inmate may be civilly committed for treatment, and either treated in a prison or transferred to a state treatment facility for treatment, without a court finding that the inmate is dangerous.[3] Further, under WIS. STAT. § 51.61(1) and (1)(g), an individual who is civilly committed *retains the right* "to refuse medication and treatment" and "exercise informed consent with regard to all medication and treatment" *unless* a court determines, upon motion following a hearing, that the individual "is not competent to refuse

[3] Neither the County nor the State suggests WIS. STAT. § 51.20(1)(ar) and (13)(a)4. contain either an explicit or implicit requirement of a finding of dangerousness.

medication or treatment."[4] These provisions also require no showing of dangerousness.

Christopher contends WIS. STAT. § 51.20(1)(ar) is facially unconstitutional on substantive due process grounds because it does not require a finding of dangerousness for a civil commitment. He continues, "[o]nce an inmate is civilly committed under [§] 51.20(1)(ar) involuntary medication may be ordered under WIS. STAT. § 51.61(1)(g) without a finding of dangerousness at any point." He asserts that "[i]ndividuals who are civilly committed may not have the option of refusing unwanted examinations or treatments, which often carry a slew of short-term and long-term negative side effects," and "even after a commitment has expired, individuals continue to bear social and legal stigmas" therefrom. Other than disagreeing with Christopher on the constitutionality of § 51.20(1)(ar), neither the County nor the State disputes any of Christopher's above points.

[4] Under WIS. STAT. § 51.61(1)(g), an individual is "not competent to refuse medication or treatment" if:

> because of mental illness …, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, … in order to make an informed choice as to whether to accept or refuse medication or treatment.

Sec. 51.61(1)(g)4. In this case, at the same trial that resulted in Christopher's civil commitment, the circuit court found that Christopher was "not competent to refuse psychotropic medication or treatment," based upon subd. para. b.

To be unconstitutional on substantive due process grounds, a statute must "unjustifiably abridge[] the Constitution's fundamental constraints … [on] … what government may do to people under the guise of the law." ***State v. Laxton***, 2002 WI 82, ¶10 n.8, 254 Wis. 2d 185, 647 N.W.2d 784 (citation omitted). A challenge to the constitutionality of a statute is a question of law reviewed de novo. ***State v. Lohmeier***, 196 Wis. 2d 432, 437, 538 N.W.2d 821 (Ct. App. 1995), *rev'd on other grounds*, 205 Wis. 2d 183, 556 N.W.2d 90 (1996). Such a challenge "must overcome a strong presumption of constitutionality." ***State v. Thiel***, 188 Wis. 2d 695, 706, 524 N.W.2d 641 (1994). "Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." ***State ex rel. Hammermill Paper Co. v. La Plante***, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). "In a facial challenge, the 'challenger must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional.'" ***State v. Pocian***, 2012 WI App 58, ¶6, 341 Wis. 2d 380, 814 N.W.2d 894 (citation omitted).

Constitutional Scrutiny Standard

The County argues that "[WIS. STAT. §] 51.20(1)(ar) furthers a compelling state interest in providing treatment to mentally ill inmates in its prisons." (Capitalization omitted.) Quoting our decision in ***State v. Olson***, 2006 WI App 32, ¶4, 290 Wis. 2d 202, 712 N.W.2d 61, it notes, "[e]ven where the statutory scheme impinges upon a fundamental liberty, as commitment admittedly does, [courts] will not invalidate it on substantive due process grounds as long as it is narrowly tailored to a compelling government interest." (Second alteration in brief.) The State argues that rational basis, as opposed to strict scrutiny, review applies. Christopher fails to argue for a particular level of scrutiny but instead

asserts that "even if rational basis review applies, [§] 51.20(1)(ar) violates substantive due process."

In ***State v. Dennis H.***, 2002 WI 104, ¶¶7, 8, 11, 255 Wis. 2d 359, 647 N.W.2d 851, Dennis's father, psychiatrist and case manager together sought and obtained the mental commitment of Dennis, who was not an inmate, based on WIS. STAT. § 51.20(1)(a)2.e. (1999-2000), the fifth standard of dangerousness under § 51.20. Dennis appealed, contending the fifth standard was unconstitutional because it (1) was vague and overbroad, (2) violated equal protection by allowing for commitment under circumstances unlike those provided for in the other four dangerousness standards of § 51.20, and (3) "violate[d] his right to substantive due process by allowing commitment without requiring evidence of a risk of imminent physical harm to himself or others." ***Dennis H.***, 255 Wis. 2d 359, ¶¶11, 15. In addressing Dennis's due process challenge, the Wisconsin Supreme Court established a deferential standard of review with regard to mental health issues generally, stating "[b]ecause of 'the uncertainty endemic to the field of psychiatry … particular deference must be shown to legislative decisions in that arena.' Accordingly, courts generally proceed with restraint in this complex, delicate, and policy-sensitive area, deferring to the procedural scheme the legislature has chosen." ***Id.***, ¶13 (citation omitted; omission in original).

In the context of reviewing a court order for involuntary administration of antipsychotic medication to an inmate covered by a state prison policy, the United States Supreme Court also applied a deferential standard of review. *See* ***Washington v. Harper***, 494 U.S. 210, 224 (1990). In ***Harper***, the Court reiterated its recognition of "the State's interests in prison safety and security." ***Id.*** at 223 (citing ***Turner v. Safley***, 482 U.S. 78, 89 (1987)). The Court stated that "the

proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'" ***Id.*** (quoting ***Turner***, 482 U.S. at 89). "This is true," the Court continued, "even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." ***Id.*** The court held that the standard was "reasonableness." ***Id.***

The liberty interest at issue with WIS. STAT. § 51.20(1)(ar) appears less significant than the liberty interest in ***Dennis H.*** in that a person affected by § 51.20(1)(ar)—"an inmate of a state prison"—does not lose, as the State puts it, his or her "freedom to live independently in open society" because the person is "not moved from the outside world into a secure correctional institution" but, if transferred, is instead "moved from one secure correctional institution into another secure correctional institution." Further, § 51.20(1)(ar) relates to both mental health and the correctional setting. Rational basis review appears to be the correct standard under which to review § 51.20(1)(ar); however, a clear statement on the standard from the Wisconsin Supreme Court would be of value.

Constitutionality of WIS. STAT. § 51.20(1)(ar)

In ***Harper***, the Court considered "what factual circumstances must exist before the State may administer antipsychotic drugs" to a prisoner against his will. ***Harper***, 494 U.S. at 220. As a prisoner, Harper was confined in a penal institution specifically designated and maintained for the diagnosis and treatment of convicted felons with serious mental disorders. ***Id.*** at 214. The Court was reviewing a state prison policy that permitted prisoners at the facility to be treated with antipsychotic drugs against their will if the state established that the prisoner

suffered from a mental disorder that was "likely to cause harm if not treated" and if the medication sought was "in the prisoner's medical interests." ***Id.*** at 222.

The Court noted that a prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." ***Harper***, 494 U.S. at 221-22. It also recognized that "a prison environment … 'by definition,' is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct,'" ***id.*** at 225 (citation omitted), and that prison safety and security are well established by case law as state interests to be legitimately and necessarily considered, ***id.*** at 223. The Court concluded the particular prison regulation before it was "a rational means of furthering the State's legitimate objectives," and held:

> [G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, *if* the inmate is dangerous to himself or others *and* the treatment is in the inmate's medical interest.

Id. at 226-27 (emphasis added). In so holding, the Court had already taken into account that the question before it related to prisoners—"persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct,'"—and that safety and security in the prison environment are important state interests. ***Id.*** at 225 (citation omitted). As such, the ***Harper*** Court's holding appears to indicate that before an inmate can be treated with antipsychotic drugs against his or her will, the government must demonstrate the inmate poses a danger to him-/herself or others.

The State concedes ***Harper*** "require[s] a dangerousness showing … where an involuntary mental health treatment consisting of antipsychotic medication is

proposed for an incarcerated inmate." Despite that concession, however, the State contends WIS. STAT. § 51.20(1)(ar) is constitutional because it is "rationally related to the legitimate goal of providing mental health services to individuals already confined in secure correctional facilities." However, this "legitimate goal" was likewise before the Supreme Court in ***Harper***; yet the Court nonetheless indicated that, before antipsychotic medications may be administered to a prisoner against his or her will, there must be a showing not only that "the treatment is in the inmate's medical interest," but *also* that "the inmate is dangerous to himself or others." ***Harper***, 494 U.S. at 227.

Twenty years after ***Harper***, the Wisconsin Supreme Court decided ***State v. Wood***, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63, in which Wood had been found not guilty of a crime by reason of mental disease or defect, was committed to the custody of the department of health and family services, and was placed at Mendota Mental Health Institute. ***Id.***, ¶1. The circuit court had granted the State's request for an order permitting the department to administer psychotropic medication to Wood without his consent under WIS. STAT. § 971.17(3)(c). ***Wood***, 323 Wis. 2d 321, ¶¶2, 8. Among other challenges, Wood argued that § 971.17(3)(c) was facially unconstitutional on substantive due process grounds because it permitted a person to be medicated against his or her will without a finding of dangerousness. ***Wood***, 323 Wis. 2d 321, ¶¶11, 14. The ***Wood*** court noted that the ***Harper*** Court had concluded that Harper had a "'significant' liberty interest in refusing the administration of antipsychotic drugs" but also had indicated that that right was "tempered by other interests, including [Harper's] medical needs and the legitimate needs of the institution in maintaining security and safety within its prisons." ***Wood***, 323 Wis. 2d 321, ¶20.

The ***Wood*** court analyzed ***Harper*** and two subsequent Supreme Court decisions, ***Riggins v. Nevada***, 504 U.S. 127 (1992), and ***Sell v. United States***, 539 U.S. 166 (2003), and determined that they "compel[led] the following conclusions":

> First, a person competent to make medical decisions has a "significant" liberty interest in avoiding forced medication of psychotropic drugs. *See* ***Harper***, 494 U.S. at 221. Second, in light of that interest, the state may not order the administration of psychotropic drugs to a mentally ill individual unless it demonstrates an overriding justification to administer the drugs and a determination of medical appropriateness. *See* ***Riggins***, 504 U.S. at 135. The incursions that substantive due process permits largely depend on what the state's overriding interest entails. For example, *in the context of a mentally ill inmate or detainee in a jail or prison*, where the safety and security of the institution is the state's interest, *one way* the state can establish an overriding justification addressing that interest is to demonstrate that the person *is dangerous* to self or others and, considering less intrusive alternatives, that medication is in the person's medical interest. *See* [***id.***] at 134-35; ***Harper***, 494 U.S. at 225-26. *In other contexts, however*, such as when the state seeks to administer medication to render a nonviolent detainee competent to stand trial, *dangerousness need not be demonstrated*; rather, a finding that the administration of drugs will affect the defendant's rights to a fair trial is sufficient. *See* ***Sell***, 539 U.S. at 180-81.

Wood, 323 Wis. 2d 321, ¶25 (emphasis added). The ***Wood*** court's use of the words "one way" suggests it may not be an absolute necessity for the government to demonstrate an inmate is dangerous before a court orders medication of the inmate against his or her will. *See* ***id.*** In the very next sentence, however, the court states that "[i]n other contexts, however, … dangerousness need not be demonstrated." *See* ***id.*** This language would seem to indicate that in the immediately preceding "context"—i.e., "the context of a mentally ill inmate or detainee in a jail or prison"—the government does need to demonstrate dangerousness.

The ***Wood*** court further indicated that "institutions holding individuals adjudged NGI have a somewhat different interest than a prison would" because such institutions treat individuals who have been found, because of mental illness, to lack "substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." ***Id.***, ¶32 (quoting WIS. STAT. § 971.15(1)). Because of this, the court continued, such institutions have an additional interest "in treating the underlying mental illness in order to prevent more criminal behavior and prepare the individual for conditional release and for eventual release from the commitment." ***Id.*** The court later stated that "[e]ven if we were to conclude that the State's interest in preparing NGI patients for conditional release was not acceptable, there remains its overriding interest in the safety and security of the institution." ***Id.***, ¶34. The court added:

> *Assuming, based on* ***Harper****,* that *that* interest *requires a finding of present dangerousness*, we are satisfied that WIS. STAT. § 971.17(3), at a minimum, implicitly provides for such a finding. We reach that conclusion based on the language of § 971.17(3)(a) that includes *requirements for a determination of dangerousness at the time of commitment*, the language of § 971.17(3)(c) requiring a doctor's examination and report when an institution seeks an order to medicate the patient involuntarily, *and* the language of § 971.17(4)(d) setting forth *requirements for periodic reviews, which include a dangerousness determination*.

Wood, 323 Wis. 2d 321, ¶34 (emphasis added). After subsequently explaining these requirements, the ***Wood*** court held:

> Those requirements, taken together, create at least an implicit finding of dangerousness, if not an express finding, that serves as a basis for a court to consider granting a motion for an involuntary medication order…. *With such a basis present*, a court evaluating a motion for an involuntary medication order *need not make* separate or independent findings of dangerousness.

Id., ¶38 (emphasis added). "For those reasons," the ***Wood*** court was satisfied that § 971.17(3)(c) facially satisfied substantive due process protections. ***Wood***, 323 Wis. 2d 321, ¶39.

In subsequently addressing the facial validity, again on substantive due process grounds, of the particular policy (regulation) challenged by Wood, the court stated, "Again, *even if we were to assume* that due process requires an express finding of dangerousness, the third requirement ["periodic reviews, which include a dangerous determination"] provides a more than adequate standard." ***Id.***, ¶¶34, 42. An unambiguous statement from our supreme court as to whether substantive due process does in fact *require* a showing of dangerousness before an inmate may be civilly committed for treatment and medicated against his or her will would be of significant value.

Here, neither the County nor the State suggests WIS. STAT. § 51.20(1)(ar) requires even an implicit showing of dangerousness prior to an order for civil commitment and treatment under that provision. Instead, they contend that § 51.20(1)(ar) is constitutional without requiring a showing of dangerousness. At least with regard to treatment of an inmate with psychotropic drugs against his or her will, this appears to be contrary to ***Harper*** and likely ***Wood***.

In ***Dennis H.***, decided eight years before ***Wood***, the Wisconsin Supreme Court addressed the fifth standard of dangerousness, where a noninmate's own health was significantly at risk due to his mental illness. The court held that the statute at issue, WIS. STAT. § 51.20(1)(a)2.e., did not violate substantive due process because even though the statute did not require a showing of "imminent" physical harm to justify commitment, it did require a showing that "a mentally ill person needs care or treatment to prevent deterioration but is unable to make an

informed choice to accept it." ***Dennis H.***, 255 Wis. 2d 359, ¶¶39, 45. The court stated:

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable to care for themselves. The state also has "authority under its police power to protect the community" from any dangerous mentally ill persons. The state's legitimate interest ceases to exist, however, if those sought to be confined "are not mentally ill *or if they do not pose some danger to themselves or others*."

Id., ¶36 (citations omitted; emphasis added). The ***Dennis H.*** court further noted, "[a] mental commitment provision is overly broad only if by its terms it could reasonably be applied to commit mentally ill persons who are not in any way dangerous to themselves or others." ***Id.***, ¶28. Thus, in ***Dennis H.***, the court stated that some showing of dangerousness—either to a person's self or another—must be made prior to a civil commitment.

Finally, we note that the State frames the issue here largely as a question of whether an inmate can be *transferred* from a traditional Wisconsin correctional facility to a correctional facility focused on providing mental health services. It emphasizes that the deprivation of liberty is substantially less when an individual is going from a traditional correctional facility to a mental health correctional facility, as opposed to going from the "outside world" to a mental health facility. Although throughout much of its brief the State treats the question presented as merely one of transferring an inmate, it does subtly acknowledge that the issue here is also about mental health "treatment" and "services" that are to be provided to the transferred inmate.

Christopher's point is that "committing an incarcerated individual under WIS. STAT. § 51.20(1)(ar) does not simply involve the transfer of the inmate from

a prison to a secure mental health facility, but also allows a court to order involuntary medication and treatment under WIS. STAT. § 51.61(1)(g) without a finding of dangerousness." Christopher recognizes that "a conviction and sentence extinguishes an individual's right to be free from confinement for the term of his sentence," but argues that "this does not authorize the State to classify an inmate as mentally ill or involuntary [sic] administer medication without due process protections."

We agree WIS. STAT. § 51.20(1)(ar) does not just address transferring an inmate from the general prison population to a mental health facility but also specifically is directed at "treatment" of the inmate. And as noted *supra*, the proper question here is "commitment" not "confinement," and whether substantive due process requires a finding of dangerousness before an inmate may be civilly committed for treatment and medicated against his or her will. Significantly, neither the State nor the County disputes Christopher's assertion in his brief-in-chief that "[o]nce a person has been committed under WIS. STAT. § 51.20(1)(ar), a court may order medication or treatment to be administered to the individual, regardless of consent, if it finds that the individual is not competent to refuse medication or treatment under WIS. STAT. § 51.61(1)(g)."

This case and the current case law present a significant question: Does substantive due process require, as the case law appears to hold, a showing that an inmate poses a danger to him-/herself and/or others before a court may order the inmate to be civilly committed for treatment and authorize the involuntary

medication of the inmate? A clear, definitive answer to this question by the Wisconsin Supreme Court would be of great value.[5]

[5] Christopher also asserts on appeal that the County failed to show by clear and convincing evidence that he was incompetent to refuse medication or treatment because the testimony presented at the hearing on this issue "merely parroted the statutory language without providing details of the information Christopher was given" pursuant to WIS. STAT. § 51.61(1)(g)4. In light of the Wisconsin Supreme Court's recent decision in ***Outagamie County v. Melanie L.***, 2013 WI 67, ¶¶67, 75-78, 94, 349 Wis. 2d 148, 833 N.W.2d 607, and the testimony presented to the circuit court on this issue in this case, Christopher's assertion appears to have merit. Acceptance of this certification would provide the supreme court with an opportunity to clarify or expound upon ***Melanie L.***